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IN THE

Supreme Court of the United States

October Term, 1978

No. 78 - 352

WILLIAMS PIPE LINE COMPANY AND
EXPLORER PIPELINE COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
UNITED STATES OF AMERICA, and
FARMERS UNION CENTRAL EXCHANGE, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF IN OPPOSITION FOR FARMERS UNION CENTRAL EXCHANGE, ET AL.

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OPINIONS BELOW

The judgment of the Court of Appeals for the District of Columbia Circuit in the proceeding styled *Farmers Union Central Exchange v. Federal Energy Regulatory Commission and the United States of America*, (No. 76-2138) was entered on June 27, 1978. That decision remanded to the Federal Energy Regulatory Commission (F.E.R.C.) the decisions by the Interstate Commerce Commission (I.C.C.)

in *Petroleum Products. Williams Brothers Pipe Line Co.*, 351 I.C.C. 102 (1975), and 355 I.C.C. 479 (1976).

JURISDICTION

The jurisdictional requisites are set forth in the petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether the review by the Court of Appeals of the decisions of the Interstate Commerce Commission finding certain oil pipeline rates to be reasonable was conducted in accordance with the principles governing judicial review of actions of an administrative agency.

2. Whether any provision of the Department of Energy Organization Act precluded judicial review and consequent remand by the Court of Appeals.

STATEMENT OF THE CASE

The facts of the case are set forth in the opinion of the Court of Appeals.[1]

ARGUMENT

The petitioning pipelines have presented no important questions which would require review by this Court. The Court of Appeal's review of the actions of the I.C.C. was conducted in a manner entirely consonant with the principles governing judicial review of the actions of administrative agencies. There is no important question

[1]The opinion appears at Appendix A. Appendix references (hereinafter "App.") will be to the appendices to the Petition for a Writ of Certiorari of Williams Pipe Line Company and Explorer Pipeline Company in No. 78-352.

presented with respect to the proper interpretation of the Department of Energy Organization Act to be settled by this Court.

1. Petitioners' principal basis for seeking review by this Court of the decision of the Court of Appeals is their contention that the Court exceeded its proper role in reviewing the action of an administrative agency. (Pet. pp. 17-21) Actually, the Court of Appeals conducted the "searching and careful" inquiry called for by the process of judicial review, at the conclusion of which it found that there was no rational basis for the I.C.C.'s findings on the three major issues of: (1) the appropriate rate base for Williams Pipe Line Company, (2) the proper rate of return on the base selected, and (3) the treatment of depreciation expenses. (App. A-17 to A-26) The irrationality of the I.C.C.'s findings on these issues forms an independent and proper basis under the Administrative Procedure Act (A.P.A.) for remanding the case to the appropriate administrative agency for further action.

The A.P.A., in Section 706(2),[2] provides several independent grounds for a reviewing court to set aside the action of an agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-414 (1971). An agency's action and the supporting findings may be found by the reviewing court to be arbitrary and capricious under Section 706(2)(A), even though it may find them to be supported by substantial evidence in accordance with Section 706(2)(E). *Bowman Transportation v. Arkansas-Best Freight*, 419 U.S. 281, 284 (1974). An action of an agency may be found to be arbitrary and capricious by the reviewing court when the agency fails to consider all the relevant factors and commits a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 416.

[2]5 U.S.C. §706(2).

Contrary to what the petitioning pipelines seem to suggest, there is nothing in this Court's recent decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, ____ U.S. ____, 55 LEd.2d 460 (1978), which suggests that these fundamental principles have been altered. (Pet. pp. 10-11, 17-19) In *Vermont Yankee*, this Court ruled only that a reviewing court should not impose procedural requirements on an agency beyond those required by statute. 55 LEd.2d at 482. Indeeed, this Court reaffirmed the basic principles of judicial review in *Vermont Yankee* by remanding that case to the Court of Appeals to determine if the challenged action had sufficient justification in the record of the administrative proceedings. Quoting from *Camp v. Pitts*, 411 U.S. 138, 143 (1973), Mr. Justice Rehnquist said:

> We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard for review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration." 55 LEd.2d at 482-483.

The Court of Appeals' action reversing the I.C.C.'s action and remanding the case to its successor agency, F.E.R.C., was consistent with these principles of judicial review of agency action. The shipper group which sought review in the Court of Appeals argued, among other things, that the I.C.C.'s decision finding that the local rates of Williams Pipe Line Company were reasonable was not supported by the I.C.C.'s explanation of the treatment it gave to the carrier's rate base, rate of return and depreciation expenses.

First, the Court of Appeals found that the I.C.C. had not provided a rational explanation for its use of the so-called "valuation base" as the appropriate rate base for determining the reasonableness under Section 1(5)(a) of the Interstate Commerce Act of the local rates of petitioner Williams Pipe Line Company. (App. A-17 to A-22) The claim that the use of such a base was "traditional" was readily shown to be unsupported by reference to the I.C.C.'s own decisions and regulations. In addition, the contention that the use of such a rate base was responsive to inflation was found by the Court of Appeals not to be supported by the I.C.C.'s decisions under review which never considered the impact of the risk of inflation on the pipeline's ability to raise capital from investors. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 808 (1968) and *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, at 603 (1944) and App. A-21 and B-16. The Court also found that the I.C.C. failed to address at all the irrationality of the "double-counting" of inflation involved in using a valuation rate base while at the same time using a purchase price base for determining the depreciation charges portion of the pipeline's operating expenses. (App. A-21 to A-22, A-24, B-23 to B-24)

The Court of Appeals also found no rational explanation for the I.C.C.'s use of a rate of return derived *solely* from decisions it had reached in another economic era.[3] (App. A-13 to A-15, A-22)

Finally, the Court of Appeals found that the I.C.C.'s treatment of depreciation expenses lacked a rational basis. The Court found that the recognition of the purchase price of the assets as a base for determining depreciation

[3]Sometime after its decision in these cases, the I.C.C. found it necessary to recognize the risks involved in a different economic environment and departed from the rate of return adopted in its earlier decisions. See *Trans Alaska Pipeline Rate Case*, ____ U.S. ____, 56 LEd.2d 591, 597, n. 13 (1978).

charges, which recognition was purportedly in compliance with the I.C.C.'s accounting regulations, was contradicted by the I.C.C.'s very decision adopting those regulations. The Court found that the I.C.C.'s treatment not only unjustifiably increased depreciation expenses, but also withdrew any recognition of almost $100 million in already charged depreciation. (App. A-23 to A-24) Further, the "double-counting" of inflation caused by the recognition of two different bases for rate of return and depreciation was not explained by the I.C.C. (*Supra*, p. 5)

Any and all of these fundamental flaws in the I.C.C.'s decisions provided an independent basis for setting aside those decisions under Section 706(2)(A) of the A.P.A.. The Court of Appeals set aside the I.C.C.'s action because of the failure of the agency's adopted rationale to provide adequate grounds for its finding that the pipeline rates at issue were reasonable. See *Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 807 (1973).

2. The petitioners also suggest that the Court of Appeals improperly interfered with the agency's decision to defer consideration of prospective changes in certain of its ratemaking criteria to a separate rulemaking case. (Pet. pp. 19-21) It should be noted that the I.C.C.'s treatment of the depreciation base, as well as other issues relating to the reasonableness of the rates at issue but not reached by the Court, (A-25, n. 33) have not been made the subject of the rulemaking proceeding.[4] As the Court of Appeals correctly recognized, the I.C.C. did reach a decision on the merits by finding in this case that the rates at issue were reasonable, rather than holding the case in abeyance.[5] (App. A-20, n.

[4]See 39 Fed. Reg. 32333 (Sept. 6, 1974) and 41 Fed. Reg. 2100 (Jan. 14, 1976).

[5]This is not to suggest that the shippers believe that the I.C.C. should have held the case in abeyance. They believe that only the most general guidelines could be adopted in the rulemaking proceeding, and any such guidelines would have limited application in a case involving a particular pipeline.

28) Faced with that fact, the Court of Appeals had no choice under the provisions of the Administrative Procedure Act and other statutes but to proceed with the review sought by the shippers on all of the issues they raised. The Act provides, in 5 U.S.C. §702, that any person aggrieved by agency action is entitled to judicial review. Such review is to be conducted in the form and manner provided by statute. See 5 U.S.C. §703 and 28 U.S.C. §§2321(a) and 2342(5). Cf. *Califano v. Sanders*, 430 U.S. 99, 104-107 (1977).

The pipelines rely on *American Commercial Lines v. Louisville and Nashville R. Co.*, 392 U.S. 571 (1968),[6] for the proposition that a deferral of certain regulatory issues to a rulemaking proceeding is appropriate. (Pet. pp. 19-21) Actually, this Court was more concerned in *Ingot Molds* with the lower court's misreading of the statute involved. 392 U.S. 584-590. There is an additional problem with the pipelines' argument. As the Court of Appeals recognized, there is little assurance that the aggrieved shippers will ever receive a disposition on the merits by the agency involved regarding the use of a valuation base as a rate base and the appropriate rate of return.[7]

3. The arguments above demonstrate that the Court of Appeals correctly concluded, in a manner consistent with the appropriate standard of review, that the I.C.C.'s decisions lacked a rational basis for several key findings. This conclusion alone supports the setting aside of those

[6]Popularly known as the *Ingot Molds* case, because of its title before the I.C.C. 326 I.C.C. 77 (1965)

[7]App. A-20, n. 28. It would be instructive for the Court to consider the fate of the rulemaking proceeding relied on in the *Ingot Molds* case as the basis for directing the lower court to allow the agency to proceed with it. After letting the rulemaking drag on for several years, the I.C.C. terminated it in October 1976 without ever reaching a decision on the issues involved. I.C.C. Docket 34013 (Sub-No. 1) *Cost Standards in Intermodal Rate Proceedings* (Order served Oct. 27, 1976).

decisions. Perhaps recognizing the firm foundation for the Court's action, the pipelines then attempt to argue that the passage of the Department of Energy Organization Act[8] precluded the remand ordered by the Court. (Pet. pp. 12-17) This argument amounts to an assertion that Congress limited the scope of judicial review, an assertion which must be supported by clear and convincing evidence. *Barlow v. Collins*, 397 U.S. 159, 166 (1970) However, even a cursory review of the pertinent provisions of the DOE Act reveals the lack of merit in the pipelines' argument, and, in fact, shows that the Court of Appeals acted in a manner entirely consistent with the legislation.

Section 705(c),[9] which petitioners rely on, provides, with regard to suits commenced prior to the effective date of the DOE Act, that:

> ". . . proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this chapter had not been enacted."

There is nothing in this language which precludes judicial review. The language is clear, and says only that a court should conduct its review as if the I.C.C. still had jurisdiction. Since the Court of Appeals found that the I.C.C.'s decisions lacked a rational basis, it was free to set them aside.

Moreover, there is clear and convincing evidence that Congress intended to permit judicial review to go forward. Section 705(a) of the DOE Act provides:

> All orders . . .
>
> (1) which have been issued, made, granted, or allowed to become effective by . . . any Federal department or agency . . . in the performance of functions which are transferred under this Act to

[8]Pub. L. 95-91, 91 Stat. 565 (Aug. 4, 1977), 42 U.S.C. §7101, *et seq.*
[9]42 U.S.C. §7295(c).

> the Department or the Commission after the date of enactment of this Act, and
>
> (2) which are in effect at the time this Act takes effect,
>
> shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by . . . *a court of competent jurisdiction* . . .[10]

Petitioners' citation of the legislative history in support of their argument that the Court of Appeals' decision was contrary to the DOE Act is both inappropriate and totally unconvincing. It is a well established principle that legislative history should not be examined unless and until it is determined that a statute has no plain meaning.[11] As already discussed, there is no ambiguity in Section 705; consequently, consideration of the legislative history is unnecessary.

Even if a review of the legislative history is undertaken, a reading of those portions cited by the pipelines does not support their position. For example, the Conference Committee Report[12] mainly relied upon by the petitioners offers no support for their argument since judicial review of final agency action always offers the possibility of a remand.

[10]42 U.S.C. §7295(a), emphasis added. See App. SA-32.
[11]*Tennessee Valley Authority v. Hill*, ____ U.S. ____, 57 LEd.2d 117, 140, n. 29 (1978)
[12]Sen. Rep. No. 95-367, 95th Cong., 1st Sess., Conf. Report to Accompany S. 826, July 27, 1977, at p. 79. It provides:

> "Judicial review of final agency action taken by the Commission of proceedings now under way which are transferred from the ICC, as well as new proceedings initiated by the Commission, will continue to be made in the same manner as if the functions had been retained in the ICC."

Having concluded that there was no rational basis for the I.C.C.'s findings on three major issues in the case, the Court of Appeals issued a remand order. Due to the transfer of jurisdiction under the DOE Act, the remand had to be directed to the new jurisdictional agency, F.E.R.C., rather than the I.C.C. Had it not been for the passage of the new legislation, the remand would have been directed to the I.C.C.

In support of their contention that the remand was a retroactive imposition of F.E.R.C. jurisdiction, the pipelines claim that the Court of Appeals relied on that agency's "clean slate request" in granting the remand. (Pet. p. 15) That claim is unwarranted and directly contradicted by a fair reading of the decision which demonstrates that the Court painstakingly reviewed the decisions relied upon by the I.C.C., as well as the rationale of the decisions under review. (App. A-10 to A-28)[13]

CONCLUSION

For all of these reasons, the petition for a writ of certiorari should be denied.

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[13]Further proof that the appeals court had not "relied" upon the "clean slate request" can be found in its discussion of the reason for rejecting an earlier F.E.R.C. request to have the case automatically remanded following the transfer of authority to it. (App. A-16, n. 22)